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8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA  
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11 TIMOTHY D. WILKINS, ) NO. 22-3608-SVW(E)  
12 Plaintiff, )  
13 v. ) ORDER DISMISSING COMPLAINT  
14 HOLCOLM, et al., ) WITH LEAVE TO AMEND  
15 Defendants. )  
16 \_\_\_\_\_ )  
17

18 For the reasons discussed below, the Complaint is dismissed with  
19 leave to amend. See 28 U.S.C. § 1915(e)(2)(B).  
20

21 BACKGROUND  
22

23 Plaintiff, a state prisoner confined at the California Men's  
24 Colony-East ("CMC-East"), filed this pro se civil rights case pursuant  
25 to 42 U.S.C. section 1983 on May 24, 2022. Defendants are: (1) CMC-  
26 East Warden D. Samuels; and (2) CMC-East Correctional Officers  
27 Holcolm, J. Hernandez, S. Kearney, and Limas. Plaintiff sues all  
28 Defendants in their individual capacities only.

1 Plaintiff alleges:

2  
3 On May 3, 2022, Plaintiff was rehoused from Facility-A  
4 to Facility-B (Complaint, ECF Dkt. No. 1, p. 7, ¶ 1).<sup>1</sup> On  
5 May 6, 2022, between 2:25 p.m. and 3:00 p.m., Plaintiff  
6 noticed "fumes" coming from the plumbing hatch of his cell  
7 and from behind the sink and toilet (id.). The fumes tasted  
8 like "vaporized Cell Block 64" (id.). The same phenomenon  
9 occurred on each of next three days, mostly at the beginning  
10 and at the end of the third watch shifts, i.e., between 2:00  
11 p.m. and 11:30 p.m. (id.). The "gassing" on May 9 at  
12 approximately 9:30-9:40 p.m. was the worst (id., ¶ 2).

13  
14 The "gas" came out "fast and strong" (id., p. 8, ¶ 2).  
15 Whatever it was, it was hazardous to humans (id.). "Whoever  
16 was doing this (Plaintiff believes it was the guards), they  
17 waited until it was 'lock-up time' to do it, so the  
18 Plaintiff would not be able to go out of his cell to get  
19 away from it" (id.). The "chemicals" completely engulfed  
20 Plaintiff's cell and entered Plaintiff's mouth and stomach,  
21 causing damage (id., ¶ 3). Although the exposure was  
22 intense, it lasted only approximately twenty minutes (id.).

23  
24 The next day, May 10, 2022, Plaintiff experienced  
25 severe abdominal pain (id.). On May 11, 2022, Plaintiff  
26 noticed that he could not lean forward without suffering

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<sup>1</sup> Because the Complaint does not bear consecutive page numbers, the Court uses the ECF pagination.

1 severe pain, and he realized that he had holes in his  
2 stomach (id.).

3  
4 On May 12, 2022, Plaintiff noticed that a portion of  
5 his stool was dark (id., ¶ 4). Plaintiff's stool was darker  
6 on May 13, 2022 and completely dark on May 14, 2022 (id.).  
7 Plaintiff submitted a medical request to see a doctor (id.).  
8

9 "Medical" responded quickly to the request (id., p. 15  
10 n.6). A nurse said Plaintiff was bleeding internally, so  
11 lab tests were ordered (id.). However, Plaintiff was not  
12 allowed to see the doctor (id.). When Plaintiff previously  
13 had holes in his stomach in November or December of 2021,  
14 Plaintiff had to wait thirty days to see a doctor, which was  
15 after the holes had closed (id.). "That way, there would be  
16 no need for procedures such as a CT scan, an [sic] no  
17 recorded evidence of the holes in Plaintiff's medical  
18 records [sic]" (id., pp. 15-16 n.6). The medical department  
19 is concealing information in violation of 18 U.S.C. section  
20 1512(c)(1) (id., p. 16 n.6).<sup>2</sup>  
21

22 Also on May 12, 2022, Plaintiff was called to the  
23 program office to be interviewed regarding a grievance  
24

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25 <sup>2</sup> Section 1512 is the federal witness tampering statute.  
26 Section 1512(c)(1) makes it unlawful to "corruptly . . .  
27 (1) alter[], destroy[], mutilate[] or conceal[] a record,  
28 document, or other object, or attempt[] to do so, with the intent  
to impair the object's integrity or availability for use in an  
official proceeding," or otherwise to "obstruct[], influence[],  
or impede[] any official proceeding, or attempts to do so. . . ."

1 Plaintiff had filed (id., p. 17, n.11). Correctional  
2 Officer Dela Garza said he had to search Plaintiff (id.).  
3 Dela Garza instructed Plaintiff to turn his head as Dela  
4 Garza patted down the opposite side of Plaintiff's body  
5 (id.). Dela Garza was harassing Plaintiff because Plaintiff  
6 was going to "talk to internal affairs" (id.). "Plaintiff  
7 believes the rest of the guards have resentment against  
8 Plaintiff for this as well" (id.).  
9

10 On May 19, 2022, at approximately 8:00 a.m., the guard  
11 on the tier, Defendant Holcolm, announced that "there was  
12 mandatory yard due to inspection" (id., p. 9, ¶ 5). The  
13 inspection occurred at approximately 9:10 a.m., shortly  
14 after Plaintiff left the building for his "medical ducat"  
15 (id.). Defendants Holcolm, Hernandez, Kearney and Limas  
16 were "working the building" during the inspection (id.).  
17 When Plaintiff returned to his cell at approximately 11:00  
18 a.m., he found it "in good order," although there were signs  
19 the cell had been searched (id.).  
20

21 In his cell, Plaintiff had an open box of instant  
22 oatmeal containing three packets (id., ¶ 6). At  
23 approximately 3:00 p.m. on May 21, 2022, Plaintiff cooked  
24 and ate the three packets of oatmeal (id.). A few minutes  
25 later, Plaintiff's mouth, stomach and inside of his nose  
26 began to burn (id.). The oatmeal had been poisoned during  
27 the May 19 building inspection (id.). "If the guards in the  
28 building participated in the building inspection, there's

1 'no way' they don't know about the poisoning" (id.).  
2 Plaintiff knows this because he observed an inspection on  
3 May 12, 2022 during which Plaintiff saw guards going door-  
4 to-door, in and out of cells (id., p. 16 n.8). It would be  
5 "unwise for Plaintiff not to assume that the other food on  
6 his shelf (1 case of Ramen noodles) was not poisoned" (id.,  
7 p. 17 n. 10). The plastic on the wrapping of the noodles is  
8 not as tight as it was prior to the inspection (id.).  
9

10 On May 22, 2022, Plaintiff submitted a medical request  
11 to see a doctor for the food poisoning (id., p. 9, ¶ 7).  
12 Later that day, at approximately 2:30 p.m., guards saw  
13 Plaintiff sitting at a table in the dayroom with a blank  
14 inmate complaint, writing a rough draft "to this argument"  
15 (id., pp. 9-10, ¶ 7). "Plaintiff was trying to decide  
16 whether to file an institutional complaint or go straight to  
17 the Court" (id.). At approximately 4:45 p.m., while  
18 Plaintiff was in his cell, he noticed the same chemical  
19 coming from the plumbing hatch that had burned holes in his  
20 stomach on May 9, 2022 (id., p. 10, ¶ 7). If the chemical  
21 is strong enough to burn holes in Plaintiff's stomach, it is  
22 strong enough to kill him (id.). Plaintiff was able to  
23 stuff wet toilet paper around the sink area and plumbing  
24 hatch to provide "some protection from the chemical  
25 exposure," and Plaintiff's open window prevents the chemical  
26 from accumulating to potentially fatal levels (id., pp. 10,  
27 ¶ 7; 16, n.9).  
28 ///

1 Defendant Holcolm harbors animosity toward Plaintiff  
2 (id., p. 10, ¶ 8). In 2018, Holcolm urinated on Plaintiff's  
3 hygiene products (id.). After inspection, Plaintiff would  
4 return to his cell to find urine in his bottles of lotion  
5 and baby oil (id.). Plaintiff wrote one or two letters to  
6 the Court concerning Holcolm's behavior in Wilkins v.  
7 Gastelo, CV 17-4322-VAP(E) or Wilkins v. California Dep't of  
8 Corrections and Rehabilitation, CV 18-9116-VAP(E) (id.).  
9 Thereafter, Holcolm did not tamper directly with Plaintiff's  
10 hygiene products, but rather "did it indirectly by letting  
11 other inmates go into Plaintiff's cell" (id., pp. 10-11, ¶  
12 8). During an inspection in 2018, Plaintiff remained in his  
13 cell due to a "medical lay-in" (id., p. 11, ¶ 8). After  
14 Holcolm pulled the lever to open all the doors on the tier,  
15 three inmates who had volunteered to clean the building  
16 walked down the tier, focused on Plaintiff's cell (id.).  
17 When they saw Plaintiff standing in his cell doorway  
18 watching them, the inmates immediately acted as if they were  
19 cleaning (id.). On another day in 2018, after an  
20 inspection, Plaintiff confronted Holcolm about the tampering  
21 with Plaintiff's hygiene products (id.). On that day,  
22 Holcolm rehoused Plaintiff to a different building (id.).  
23 One of the porters who works on the tier in the building  
24 where Plaintiff is now housed told Plaintiff that Holcolm  
25 works that tier approximately once a month (id., pp., 16-17  
26 n.10).

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28 ///

1 Plaintiff "does not know exactly which guard did or did  
2 not do the poisoning" (id., p. 11, ¶ 9). Of the guards who  
3 worked the building and conducted the May 19, 2022  
4 inspection, Holcolm was the one with a "higher motive to do  
5 it" (id.). "The Plaintiff's Eighth Amendment rights were  
6 violated" (id.).

7  
8 Defendant Samuels' subordinates "keep committing  
9 constitutional violations under color of law against  
10 Plaintiff (id., p. 12, ¶ 10). Samuels refuses to train,  
11 supervise and control his subordinates (id., p. 12). "They"  
12 violated Plaintiff's Eighth Amendment rights in Wilkins v.  
13 Lowe, CV 18-9159-VAP(E), Wilkins v. Correctional Officers,  
14 CV 21-3383-VAP(E), and Wilkins v. Samuels, CV 22-2434-VAP(E)  
15 (id.).

16  
17 The Complaint contains two claims for relief: (1) a claim for  
18 alleged violation of the Eighth Amendment (Claim I); and (2) a  
19 supervisor liability claim against Defendant Samuels (Claim II).  
20 Plaintiff seeks compensatory, special, nominal and punitive damages,  
21 as well as unspecified injunctive relief.

22  
23 Plaintiff attaches to the Complaint the following documents:

24  
25 1. A "Health Care Services Request Form," Form CDCR 7362,  
26 allegedly written by Plaintiff and bearing a date of May 14, 2022, in  
27 which Plaintiff complained of purported "fumes" which tasted like  
28 "Cell Block 64" allegedly entering his cell on May 4, 2022, which

1 supposedly caused Plaintiff to suffer holes in his stomach and black  
2 stools;

3  
4 2. An "Inmate Priority Pass" bearing Plaintiff's name, an issue  
5 date of May 17, 2022 and an appointment date of May 18, 2022; and  
6

7 3. A "Health Care Services Request Form," Form CDCR 7362,  
8 allegedly written by Plaintiff and bearing a date of May 21, 2022,  
9 alleging that Plaintiff was suffering severe stomach pain from eating  
10 food that purportedly was poisoned during a building inspection, and  
11 that Plaintiff allegedly needed to see a doctor for holes in  
12 Plaintiff's stomach supposedly caused by "fumes" entering Plaintiff's  
13 cell through the plumbing hatch.  
14

#### 15 DISCUSSION

16

17 Under Rule 8(a) of the Federal Rules of Civil Procedure, a  
18 complaint must contain a "short and plain statement of the claim  
19 showing that the pleader is entitled to relief." "Each allegation  
20 must be simple, concise, and direct." Fed. R. Civ. P. 8(d)(1).  
21 Conclusory allegations are insufficient. See Ashcroft v. Iqbal, 556  
22 U.S. 662, 678, 686 (2009). "Experience teaches that, unless cases are  
23 pled clearly and precisely, issues are not joined, discovery is not  
24 controlled, the trial court's docket becomes unmanageable, the  
25 litigants suffer, and society loses confidence in the court's ability  
26 to administer justice." Bautista v. Los Angeles County, 216 F.3d 837,  
27 841 (9th Cir. 2000) (citations and quotations omitted).  
28

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Plaintiff's pleaded allegations do not comply with Rule 8. Plaintiff's confused allegations that prison guards "poisoned" Plaintiff by supposedly contaminating his food and wafting chemical fumes into Plaintiff's cell border on the delusional.<sup>3</sup> Plaintiff's wholly speculative allegations concerning the purported responsibility of any Defendant for any of the alleged wrongdoing are insufficient to state a claim against anyone. Indeed, Plaintiff admits he does not know who "poisoned" Plaintiff. Plaintiff speculates that Defendant Holcolm is somehow responsible because, some four years ago, Holcolm supposedly urinated on Plaintiff's hygiene items. Plaintiff's speculative and conclusory allegations are insufficient to state any cognizable claim for relief. See Ashcroft v. Iqbal, 556 U.S. at 678, 686 (plaintiff must allege more than an "unadorned, the-defendant-unlawfully-harmed me accusation"); a pleading that

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<sup>3</sup> Plaintiff made similar allegations in the past, against different prison officials and during different time periods. The Court takes judicial notice of the dockets and documents in Plaintiff's prior cases. See Porter v. Ollison, 620 F.3d 952, 954-55 n.1 (9th Cir. 2010) (federal court may take judicial notice of court records). In attempted filings in Wilkins v. Lowe, CV 19-9159-VAP(E), Plaintiff alleged that prison officials were poisoning Plaintiff's food and sending chemical fumes into his cell. Id., Dkt. Nos. 50 (received August 27, 2020), 51 (received September 11, 2020), 52 (received September 15, 2020), 58 (received December 11, 2020). In Wilkins v. Correctional Officers, CV 21-3383-VAP(E), Plaintiff three times unsuccessfully sought preliminary injunctive relief on the grounds that prison officials were poisoning Plaintiff's food and/or sending "pepper spray" or chemical fumes into Plaintiff's cell (Dkt. Nos. 9, 29, 50). The District Court deemed Plaintiff's allegations to be speculative and conjectural. Id., Dkt. Nos. 10, 41, 52; see Wilkins v. Correctional Officers, 2022 WL 1164232, at \*1 (C.D. Cal. Mar. 15, 2022); Wilkins v. Correctional Officers, 2021 WL 6104413, at \*1 (C.D. Cal. Nov. 23, 2021), aff'd, 2022 WL 1153927 (9th Cir. Apr. 19, 2022); Wilkins v. Correctional Officers, 2021 WL 4815022, at \*2 (C.D. Cal. May 19, 2021). The Ninth Circuit dismissed Plaintiff's appeal from the first denial order for failure to prosecute, and affirmed the second denial order. Id., Dkt. Nos. 16, 56. Plaintiff's appeal from the third denial order remains pending.

1 "offers labels and conclusions or a formulaic recitation of the  
 2 elements of a cause of action will not do") (citations and quotations  
 3 omitted). Plaintiff fails to allege what each Defendant did or did  
 4 not do to violate Plaintiff's rights. To state a cognizable section  
 5 1983 claim, "[a] plaintiff must allege facts, not simply conclusions,  
 6 that show that an individual was personally involved in the  
 7 deprivation of his civil rights." Barren v. Harrington, 152 F.3d  
 8 1193, 1194 (9th Cir. 1998), cert. denied, 525 U.S. 1154 (1999). A  
 9 complaint is subject to dismissal if one cannot determine from the  
 10 complaint who is being sued and for what relief. McHenry v. Renne, 84  
 11 F.3d 1172, 1178 (9th Cir. 1996); see also Fagbohunge v. Caltrans,  
 12 2014 WL 644008, at \*3 n.4 (N.D. Cal. Feb. 19, 2014) ("The general  
 13 allegation regarding 'defendants' is . . . insufficient on its face  
 14 because it does not identify which specific defendants . . .");  
 15 Chevalier v. Ray and Joan Kroc Corps. Cmty. Ctr., 2012 WL 2088819, at  
 16 \*2 (N.D. Cal. June 8, 2012) (complaint that failed to "identify which  
 17 wrongs were committed by which Defendant" insufficient).

18  
 19 As the Court previously has advised Plaintiff,<sup>4</sup> Plaintiff may not  
 20 sue Warden Samuels or any other supervisor pursuant to 42 U.S.C.  
 21 section 1983 on a theory that the supervisor is liable for the acts of  
 22 his or her subordinates. See Polk County v. Dodson, 454 U.S. 312, 325  
 23 (1981). A supervisor "is only liable for his or her own misconduct,"  
 24 and is not "accountable for the misdeeds of [his or her] agents."  
 25 Ashcroft v. Iqbal, 556 U.S. at 667. Mere knowledge of a subordinate's

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26  
 27 <sup>4</sup> See "Order Dismissing Complaint With Leave to Amend"  
 28 filed November 4, 2019 in Wilkins v. Lowe, CV 19-9159-VAP(E);  
 "Order Re Motion to Dismiss First Amended Complaint" filed  
 April 21, 2020 in Wilkins v. Lowe, CV 19-9159-VAP(E).

1 alleged misconduct is insufficient. Id. A supervisor may be held  
2 liable in his or her individual capacity "for [his or her] own  
3 culpable action or inaction in the training, supervision or control of  
4 [his or her] subordinates." Watkins v. City of Oakland, Cal., 145  
5 F.3d 1087, 1093 (9th Cir. 1998) (citation and internal quotations  
6 omitted). To state a cognizable section 1983 claim, "[a] plaintiff  
7 must allege facts, not simply conclusions, that show that an  
8 individual was personally involved in the deprivation of his civil  
9 rights." Barren v. Harrington, 152 F.3d at 1194. The Complaint  
10 alleges no facts from which Warden Samuel's liability plausibly might  
11 be inferred.

12  
13 To the extent Plaintiff alleges that any Defendant failed to  
14 provide adequate medical care for Plaintiff, any such claim is  
15 insufficient. As the Court previously has advised Plaintiff,<sup>5</sup> prison  
16 officials can violate the constitution if they are "deliberately  
17 indifferent" to an inmate's serious medical needs. See Farmer v.  
18 Brennan, 511 U.S. 825, 834 (1994); Estelle v. Gamble, 429 U.S. 97, 104  
19 (1976). To be liable for "deliberate indifference," a prison official  
20 must "both be aware of facts from which the inference could be drawn  
21 that a substantial risk of serious harm exists, and he must also draw  
22 the inference." Farmer v. Brennan, 511 U.S. at 837. Allegations of  
23 negligence do not suffice. Estelle v. Gamble, 429 U.S. at 105-06;  
24 Lopez v. Smith, 203 F.3d 1122, 1131 (9th Cir. 2000). Thus, inadequate

25  
26  
27 <sup>5</sup> See "Order Dismissing Complaint With Leave to  
28 Amend" filed April 1, 2019 in Wilkins v. State of California, CV  
19-2048-VAP(E); "Report and Recommendation of United States  
Magistrate Judge" file March 5, 2020 in Wilkins v. State of  
California, CV 20-818-VAP(E).

1 treatment due to accident, mistake, inadvertence, or even gross  
 2 negligence does not amount to a constitutional violation. Estelle v.  
 3 Gamble, 429 U.S. at 105-06; Toguchi v. Chung, 391 F.3d 1051, 1057 (9th  
 4 Cir. 2004). "[A]n official's failure to alleviate a significant risk  
 5 that he should have perceived but did not, while no cause for  
 6 commendation, cannot . . . be condemned as the infliction of  
 7 punishment." Farmer v. Brennan, 511 U.S. at 838. The Complaint  
 8 alleges no facts showing that any Defendant knew of, and subjectively  
 9 disregarded, any alleged serious medical need of Plaintiff.

10  
 11 To the extent Plaintiff alleges that Defendant Holcolm or any  
 12 Defendant retaliated against Plaintiff, the Complaint is insufficient.  
 13 As the Court previously advised Plaintiff,<sup>6</sup> prison officials may  
 14 not retaliate against inmates for the inmates' exercise of their First  
 15 Amendment rights. See Rhodes v. Robinson, 408 F.3d 559, 567-68 (9th  
 16 Cir. 2005). "Within the prison context, a viable claim of First  
 17 Amendment retaliation entails five basic elements: (1) An assertion  
 18 that a state actor took some adverse action against an inmate  
 19 (2) because of (3) that prisoner's protected conduct, and that such  
 20 action (4) chilled the inmate's exercise of his First Amendment  
 21 rights, and (5) the action did not reasonably advance a legitimate  
 22 correctional goal." Id. at 567-68 (citations and footnote omitted).  
 23 Plaintiff must allege "a chronology of events from which retaliation  
 24 can be inferred. . . ." Watison v. Carter, 668 F.3d 1108, 1114 (9th  
 25

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26 <sup>6</sup> See "Order Dismissing Complaint With Leave to Amend"  
 27 filed April 1, 2019 in Wilkins v. State of Calif., et al., CV 19-  
 28 Magistrate Judge," filed March 5, 2020 in Wilkins v. State of  
California, CV 20-818-VAP(E), adopted, April 17, 2020.

1 Cir. 2012). Plaintiff has failed to allege facts from which the  
2 elements of a retaliation claim against Holcolm or any other Defendant  
3 plausibly might be inferred.


4  
5 To the extent Plaintiff purports to allege a claim based on an  
6 alleged violation of 18 U.S.C. section 1512(c)(1), any such claim is  
7 insufficient as a matter of law. There is no private cause of action  
8 for an alleged violation of section 1512. See Rowland v. Prudential  
9 Fin., Inc., 362 Fed. App'x 596, 596-97 (9th Cir.), cert. denied, 562  
10 U.S. 962 (2010); Albanese v. City of Anaheim, 2020 WL 6265131, at \*6  
11 (C.D. Cal. Sept. 9, 2020), adopted, 2020 WL 6263184 (C.D. Cal.  
12 Oct. 22, 2020); Shahin v. Darling, 606 F. Supp. 2d 525, 538 (D. Del.),  
13 aff'd, 350 Fed. App'x 605 (3d Cir. 2009) (citing cases).

14  
15 **ORDER**

16  
17 The Complaint is dismissed with leave to amend. If Plaintiff  
18 still wishes to pursue this action, he is granted thirty (30) days  
19 from the date of this Order within which to file a First Amended  
20 Complaint. Any First Amended Complaint shall be complete in itself  
21 and shall not refer in any manner to the original Complaint.  
22 Plaintiff may not add Defendants without leave of court. See Fed. R.  
23 Civ. P. 21. Failure timely to file a First Amended Complaint in  
24 conformity with this Order may result in the dismissal of the action.  
25 See Pagtalunan v. Galaza, 291 F.3d 639, 642-43 (9th Cir. 2002), cert.  
26 denied, 538 U.S. 909 (2003) (court may dismiss action for failure to  
27 follow court order); Simon v. Value Behavioral Health, Inc., 208 F.3d  
28 1073, 1084 (9th Cir.), amended, 234 F.3d 428 (9th Cir. 2000), cert.

1 denied, 531 U.S. 1104 (2001), overruled on other grounds, Odom v.  
2 Microsoft Corp., 486 F.3d 541 (9th Cir.), cert. denied, 552 U.S. 985  
3 (2007) (affirming dismissal without leave to amend where plaintiff  
4 failed to correct deficiencies in complaint, where court had afforded  
5 plaintiff opportunities to do so, and where court had given plaintiff  
6 notice of the substantive problems with his claims); Plumeau v. School  
7 District #40, County of Yamhill, 130 F.3d 432, 439 (9th Cir. 1997)  
8 (denial of leave to amend appropriate where further amendment would be  
9 futile).

10  
11 DATED: June 17, 2022.

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13   
14 STEPHEN V. WILSON  
UNITED STATES DISTRICT JUDGE

15  
16  
17 Presented this 15th day of  
18 June, 2022, by:

19  
20 /S/  
21 CHARLES F. EICK  
22 UNITED STATES MAGISTRATE JUDGE  
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